Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 435

ROBERT L. RICHMOND,

Petitioner,

versus

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT L. RICHMOND,
Petitioner, pro se.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Robert L. Richmond, respectfully prays for a writ of certiorari to the Court of Appeals for the Fifth Circuit to review the judgment entered by that Court in this case.

A certified transcript of the record in this case, including the proceedings in said Court of Appeals, is furnished herewith, in accordance with Rule 38 of this Court.

Opinions of the Courts Below

The opinion of the District Court (R. 45) is reported at *Richmond* v. *St. Louis Southwestern Ry Co.* , D. C. La., 99

F. Supp. 755. The opinion of the Court of Appeals (R. 76) is reported at *Richmond* v. *St. Louis Southwestern Ry Co.*, C. C. A. 5, 197 F. 2d 840.

Jurisdiction

The jurisdiction of the Court is invoked under 28 U. S. Code Section 1254(1).

The judgment of the Court of Appeals for the Fifth Circuit (No. 14025) which petitioner seeks to have reviewed was entered June 30, 1952 (R. 80). A petition for rehearing filed by your petitioner on July 21, 1952 (R. 81) was denied on August 4, 1952 (R. 88).

Summary and Short Statement of the Matter Involved

This is a suit for damages against the respondent railroad company for wrongful discharge contrary to the terms of a written contract of employment between the Clerks and the railroad under the Railway Labor Act, 45 U. S. C. A., Section 151 *et seq.* (R. 2).

Without filing an answer to the complaint respondent moved pursuant to Rule 56 of the Federal Rules of Civil Procedure, 28 U. S. C. A., for a summary judgment (R. 9) based on three grounds: (a) that the claim had been settled by a written agreement of compromise; (b) that plaintiff was expressly excluded from the coverage of the agreement relied on by petitioner; and (c) that the claim was barred by prescription of one, three and ten years, as established by Articles 3534, 3538 and 3544, respectively, of the Revised Civil Code of 1870 of the State of Louisiana, which motion was signed only by respondent's attorney, was not made on his personal knowledge, nor was it shown that the attorney possessed the knowledge asserted, and the motion was not in affidavit form as required by the mandatory provisions of subdivision (e) of the Rule (R. 11), nor

were the documents attached to the motion for summary judgment in affidavit form (R. 20), which fact was noted by the Judge of the District Court in his written opinion (R. 50 first paragraph).

Petitioner filed affidavit in opposition to respondent's motion for summary judgment (R. 21), in which he verified the allegations made in his complaint, and denied all of the averments alleged in respondent's unverified motion for summary judgment, which created genuine issues as to material facts that required the usual trial by witnesses, subject to cross-examination, and precluded the granting of summary judgment.

The motion for summary judgment was set for hearing on July 13, 1951, and although it had been a rule of the District Court for a number of years for the Clerk to notify the parties litigant, or their attorneys, five days in advance of the date set for hearings on motions, respondent's attorney was notified but your petitioner was not, and at the hearing in petitioner's absence, the Court on July 13, 1951 ordered the motion submitted on briefs, without oral argument (R. 50 last line). Petitioner filed motion to vacate judgment (R. 61) which the Court refused to hear.

The compromise settlement in the State Court suit urged as a defense by respondents shown by the petition in that suit (R. 11) to be an action for wages due and unpaid before discharge, and penalties for delay in making payment, under the statutory penal provisions of Act Number 150 of the Louisiana Legislature of 1920, as amended by Act Number 138 of 1936, which Act requires the employer to pay or tender payment of the amount due within twenty-four hours after demand, and as a penalty shall be liable to the employee for his full wages until payment is made, and, in addition, reasonable attorney's fees. The word damages is not mentioned in the petition, and, since the

penal statute was restricted to unpaid wages only, petitioner's separate and distinct claim for damages for wrongful discharge, the basis of this suit, could not have been proved or recovered under the provisions of the Act, and the pleadings in the State Court suit. The provisions of the Act are as follows:

"Discharged Laborers — Payment within twenty-four hours.—It shall be the duty of every person, individual, firm or corporation employing laborers or other persons of any kind whatsoever when they have discharged any laborer or other employee, or when any such laborer or employee has resigned, within twenty-four hours after such discharge or resignation, to pay the laborer or employee the amount due under the terms of employment whether said employment is made by the day, week or month, upon demand being made by the said discharged or resigned laborer or employee, upon his employer, at the place where said employee or laborer is usually paid. (Acts 1920, No. 150, Sec. 1; 1936, No. 138, Sec. 1.) Dart's Statutes, Sec. 4360."

"Penalty for violating Act.—Any individual, firm, person or corporation employing laborers, or others in this state shall fail or refuse to comply with the provisions of Section 1 (Sec. 4360) of this Act, shall be liable to the said laborer or other employee for his full wages from the time of such demand for payment by the discharged or resigned laborer or employee, until the said person, firm, or corporation shall pay or tender payment of the amount due to such laborer or other employee, provided further, that reasonable attorney's fees shall be allowed such laborer or employee by the court in addition thereto and taxed as costs to be paid by such employer, in event a just suit is filed by such laborer or employee after twenty-four hours shall have elapsed from time of making such first demand follow-

ing discharge or resignation. (Acts 1920, No. 150, Sec. 2; 1936, No. 138, Sec. 1) Dart's Statutes, Sec. 4361."

The purpose of the Act is stated in paragraphs (1, 2) of the opinion of the Louisiana Court of Appeals, Second Circuit, in the case of *Hazel* v. *Robinson*, 174 So. 105, and in the decision of the Supreme Court of Louisiana in the case of *Bannon* v. *Techeland Oil Corp.*, 17 So. 2d 921.

An unverified copy of the "Agreement of Transaction and Compromise" entered in settlement of the suit for wages in the State Court suit was attached to respondent's unverified motion for summary judgment, but was not included in the State Clerk of Courts' unverified certificate, which mentioned only "the petition and motion to dismiss in suit No. 84,515 entitled Robert L. Richmond v. St. Louis Southwestern Railway Company, as same appears on the docket of the First Judicial District Court in and for Caddo Parish, Louisiana" (R. 20), and being invalid in form, and inadmissible in evidence, the Court was precluded from considering the purported copy of the "Agreement of Transaction and Compromise" in determining whether summary judgment should be granted.

The invalid copy of the purported compromise agreement is included in the record as a supplement (R. 72), and the intention of the parties to the agreement is clearly shown by the phraseology of the second paragraph thereof to be that the only subject-matter contemplated by them was to settle "the subject matter of the foregoing suit without litigation through the courts," which subject matter as shown by the copy of the petition in the State Court suit (R. 11) filed by respondent in support of its motion for summary judgment was petitioner's claim for wages due and unpaid before his discharge, and penalties for delay in making such payment under the State Penal Act.

The compromise agreement in the State Court suit was

made pursuant to the provisions of Articles 3071 and 3083 inclusive, of the Revised Civil Code of Louisiana which deal with the subject "Of Transaction or Compromise," and Article 3073 provides:

"Matters Covered by Compromise. Transactions regulate only the differences which appear clearly to be comprehended in them by the intention of the parties, whether it be explained in a general or particular manner, unless it be the necessary consequence of what is expressed; and they do not extend to differences which the parties never intended to include in them.

The renunciation, which is made therein to all rights, claims and pretensions extends only to what relates to the differences on which the transaction arises."

The purpose of the compromise agreement, and the intention of petitioner and respondent at the time the agreement was executed, was to settle between themselves petioner's claim for due and unpaid wages in suit No. 84,513 in the State Court, which recital is specific as to the subject matter contemplated, and since the particular recital preceded the general words of release, the release was restricted to the claim particularly recited, and extended to no other claim.

Petitioner in paragraph 2 of his affidavit filed in opposition to defendant's (respondent herein) motion for summary judgment (R. 22) denied that it was the intention of the parties to include petitioner's claim for damages for wrongful discharge in the compromise agreement in the settlement of the suit for wages in the State Court, which fact is admitted by respondent's averment in Article 3, sub-paragraph (b) of respondent's motion for summary judgment (R. 10) that "The fact that the position in which the plaintiff (petitioner herein) was employed at the time

of his discharge was expressly excluded from coverage under the contract sued on by the plaintiff," • • • • which is an admission that respondent was of the opinion at the time of the compromise settlement, and to the present time, that petitioner's employment was not covered by the contract, and, therefore, had no cause of action for a claim for damages for wrongful discharge under the provisions of the contract.

It is obvious from the District Court Judge's written opinion (R. 54 last paragraph) that his conclusions were based wholly on his erroneous conclusion that Louisiana law requires the cumulation of actions, and that a discharged employee has only a single cause of action arising from the employment after his discharge.

The law applicable to the cumulation of actions in Louisiana is governed by Article 148 of the Louisiana Code of Practice, which provides:

"Separate actions may be cumulated in the same demand, except in the cases hereafter expressed; this is termed cumulation of action."

The above Article was interpreted by the Supreme Court of Louisiana in the case of *In re Dimmick's Estate, et al.*, 111 La. 655, 35 So. 801, as follows:

"A plaintiff is not compelled to include in his suit all the demands he may have against the defendant. It is expressly provided in the code that he may do so (Article 148), but it is nowhere provided that he must do so."

Article 147 of the Louisiana Code of Practice reads:

"A demand means a civil action brought before a court of justice to obtain a thing to which one thinks himself entitled."

Article 2046 of the Louisiana Civil Code quoted by the District Judge in his opinion (R. 56) provides the remedies granted a litigant for breach of contract, and it is obvious that the Article has no application to an employee's claim for wages earned and due before discharge, which two actions are clearly distinguished in the case of *Elliott v. Miller*, 17 N. Y. S. 526 (New York, 1892), and the decision of the Supreme Court of Errors of Connecticut in the case of *Wall v. Lionel Mfg. Co.*, 98 Atlantic 329. Also, 5 Williston on Contracts, page 3810, Section 1358.

Articles 1930 - 1935 of the Revised Civil Code of Louisiana quoted by the District Judge in his opinion (R. 57) have no application to this action for damages for wrongful discharge for the burden is on the employer to plead the facts which he asserts will minimize the damages claimed by the employee. 56 C. J. S., page 452, Section 52 Pleadings. Matters in mitigation of damages.

The District Judge's opinion further manifests the fact that he did not comprehend that petitioner's claim under the Louisiana penal statute was separate and independent from his claim for damages for wrongful discharge under the Railway Labor Act in the instant action with his quotation of a part of the release (R. 57) without considering the preceding recitals in the agreement (R. 72) that restricted the release to petitioner's claim for wages in the State Court suit only, and particularly so when Article 1950 of the Louisiana Civil Code on the subject "Of the Interpretation of Agreements" provides:

"Comparison of all clauses. All clauses of agreements are interpreted the one by the other, giving to each the sense that results from the entire Act," and, the District Court Judge disregarded the fact that the rule in such cases is "that words of general application used in a release, which follows a specific recital of the subject matter con

cerned, are not to be given their broadest significance but will be restricted to the particular matters referred to in the recital."

Petitioner's complaint (R. 2) shows on its face that it alleges facts sufficient under the requirements of the Federal Rules of Civil Procedure that a complaint should contain a short and plain statement of the claim showing that the pleader is entitled to relief, to constitute a cause of action for breach of an employment contract by wrongful discharge, and the decision of the Judge of the District Court (R. 57) that the instant action was a demand for wages, and was barred by the three year prescription pleaded by the defendant (respondent) under Article 3538 of the Civil Code (Louisiana), which provides in part:

"The following actions are prescribed by three years:

* * * * * * *

That for the salaries of overseers, clerks, secretaries, and of the teachers of the sciences * * * was in disregard of the Louisiana prescription applicable to contracts, since liberative prescription in Louisiana is governed by Articles 3528 to 3550 inclusive of the revised Civil Code, and Article 3544 of the Civil Code reads as follows:

> "In general, all personal actions, except those before enumerated, are prescribed by ten years."

Actions on contracts are not enumerated in any of the Articles before 3544, and since prescription is stricti juris and cannot be extended by analogy from one subject to another, *Gore* v. *Veith*, 156 So. 823, and this being a suit for breach of contract the ten year prescription period is applicable.

The allegations of petitioner's complaint (R. 5) show that he was discharged on March 26, 1941, and the record in this action shows that it was duly filed on March 26, 1951 (R. 9).

The computation of time under prescription in Louisiana is governed by Article 3467 of the Revised Civil Code, which reads:

"Computed by Days and Not by Hours. The time required for prescription is reckoned by days, and not by hours; it is only acquired after the last day allowed by law has elapsed."

The law is stated by the Supreme Court of Louisiana in the case of *McWilliams* v. *Comeaux*, 65 So. 112, which held:

"It is settled that to 'reckon from a particular day', for the purpose of prescription, means that the reckoning begins from and after, and does not include, the day reckoned from. Hence, reckoning a period of ten years from February 13, 1901, in order to determine the question of prescription vel non of the inscription of a mortgage, the day mentioned (being that of the original inscription) should be excluded, and the whole of February 13, 1911, should be included."

The District Court Judge stated in his opinion (R. 54—last paragraph) that "No reason appears why plaintiff could not in that action (suit for wages in State Court) have included damages for breach of contract of employment, just as he has in this court, and a serious question arises as to whether, having failed to do so, he waived and abandoned any claim therefor under the provisions of Article 156 of the Louisiana Code of Practice, since it grows out of the same subject matter, the employment and alleged wrongful discharge, and was therefore part of a single cause of action."

The Code of Practice article referred to, Article 156 reads as follows:

"If one demand less than is due him, and do not amend his petition to augment his demand, he shall lose the overplus."

It is obvious that the above quoted article is applicable only to a single claim, and the Courts' quotation, and his entire written opinion, unmistakably shows that his erroneous findings of fact and conclusions of law throughout his opinion were based wholly on his failure to note and comprehend that a claim for wages earned, due, and unpaid before discharge from employment, and a claim for damages for wrongful discharge from employment under a written contract of employment constitute two separate and independent causes of action.

The Court overlooked the fact that in 1942 this country was engaged in a war and that employment was available for most any person, including your petitioner, and at the time the suit was filed in the State Court for the unpaid wages, it would have been difficult to show or prove any amount of prospective damages for they were too uncertain at that time, and, that under the rules of prescription a claimant is not condemned because he awaits the full prescriptive period authorized by the law to fully determine the actual amount of damages sustained by him before instituting suit.

Under the terms of Rule 29 of the contract between the clerk's union and the respondent alleged in petitioner's complaint (R. 4) an action for damages for wrongful discharge on the contract prior to seven (7) days after petitioner's discharge would have been premature, and, accordingly, the prescriptive period did not begin to run until seven (7) days after March 26, 1941, or until such time as respondent gave petitioner notice or manifestation that the employment contract would not be respected. The record in this suit shows that action was brought within the pre-

scriptive period of ten years, and that it is not barred by prescription applicable to contracts.

Statutes Involved

The pertinent provisions of the Railway Labor Act, 45 U. S. C., Section 151, *et seq.*, and Rule 56, Summary Judgment of the Federal Rules of Civil Procedure, 28 U. S. C., are set forth in the Appendix.

Article 3073 Of Transaction or Compromise of the Revised Civil Code of Louisiana, and Act Number 150 of the Louisiana Legislature of 1920, as amended by Act Number 138 of 1936, are also set forth in the Appendix.

Questions Presented

The questions presented by this petition are:

1. Whether in an action under the Railway Labor Act for damages for wrongful discharge a purported release interposed as a defense raises a federal question subjecting the determination of the intention of the parties to the release to the rule that was applied by this Court in the case of *Texas and Pacific Railway Company* v. *Baskell*, 198 U. S. 521, that "General words in a release are to be limited and restricted to the particular words in the recital." • • •

2. Whether an action under the Railway Labor Act, 45 U. S. C. A., Sections 151 *et seq.*, by a former railroad employee against the railroad for damages for wrongful discharge contrary to the terms of a written collective bargaining agreement between the railroad clerks union and the railroad is barred by a release given by the employee to the railroad in settlement of a prior suit brought by the employee against the railroad in a Louisiana State Court for his salary due and unpaid at the time of his discharge, together with penalty and attorney's fees an-

thorized by the provisions of Act Number 150 of the Louisiana Legislature of 1920, as amended by Act Number 138 of 1936, when an employer fails or refused to pay or tender payment of the amount due the employee after his discharge, which release was restricted by its particular recital to "the foregoing suit without litigation through the Courts, of the demands of plaintiff against defendant, and as more fully set forth in the pleadings in this action," which particular recital preceded the words of general application used in the release, and the pleadings in the State Court showed on their face that they were confined to the employee's claim for unpaid salary and penalties under the state statute only with no claim being made for damages for wrongful discharge in the pleadings.

3. Whether an action under the Railway Labor Act against a railroad for damages for discharge in violation of railroads' written agreement with clerk's union is an action for wages and barred at the end of three years under Article 3538 of the Louisiana Civil Code, which provides in part: "The following actions are prescribed by three years:

* * * * * * *

That for the salaries of overseers, clerks, secretaries, and teachers of the sciences, who give lessons by the year or quarter," or is, as petitioner contends barred only at the end of ten years as provided for written contracts by Article 3544 of the Louisiana Civil Code, which reads: "In general, all personal actions, except those before enumerated are prescribed by ten years."

4. Whether a Court may grant summary judgment for a defendant before answer is filed under Rule 56 of the Federal Rules of Civil Procedure, 28 U. S. C. A., when the motion signed by the attorney for the defendant movant was not in affidavit form, was not made on the attorney's

personal knowledge, nor shown that the attorney possessed the knowledge asserted, and the purported supporting documents annexed to the motion were not in affidavit form, as required by the mandatory provisions of subdivision (e) of the rule or is, as petitioner contends, the motion a complete nullity.

5. Whether a Court may grant summary judgment under Rule 56 of the Federal Rules of Civil Procedure, 28 U. S. C. A., when the record discloses that contested material issues are so in conflict as to the particular matters presented by both parties that a genuine issue as to material fact is created which could not be resolved on motion for summary judgment before trial by witnesses, subject to cross-examination.

6. Whether a Court may grant a summary judgment when genuine issues of material fact remain for trial, and the moving party has failed to show that it is entitled to judgment as matter of law.

7. Whether the legislative policy of the Railway Labor Act to give railroad employees a right to recover just compensation for wrongful discharge prohibits the employer to benefit by its wilful and arbitrary refusal to pay an employee his wages due up to the time of his discharge until necessity compels the employee to invoke a state penal statute to enforce payment of his wages, and after a fair settlement of the claim for the due and unpaid wages under the penal statute use the receipt and release in an attempt to defeat the employee's claim for damages for wrongful discharge, and, in effect, defeat the mandate, and purpose of the Railway Labor Act.

Specifications of Error To Be Urged

The United States Court of Appeals for the Fifth Circuit erred:

1. In affirming the judgment of the District Court.

2. In holding that an action for unpaid wages due at the time of discharge under a contract of employment, and an action for damages for breach of contract by wrongful discharge under the provisions of the Railway Labor Act, constitute a single cause of action.

3. In failing to hold that a claim for wages due and unpaid at time of discharge, and a claim for damages for wrongful discharge under the provisions of the Railway Labor Act constitute separate and independent causes of action.

4. In holding that a release given by a former railroad employee to the railroad in a compromise and settlement in a State Court suit for wages due and unpaid before discharge, and penalties for delay in making such payment granted by State Statute, in which compromise agreement the intention of the parties was shown to be:

> "Whereas all of the parties hereto desire to compromise and to settle between themselves the subject matter of the foregoing suit without litigation through the Courts, of the demands of plaintiff against defendant, and as all more fully set forth in the pleadings in this action, each preferring to the hope of gaining, balanced by the danger of losing."

which particular recital immediately preceded the words of general application used in the release, constituted a bar to the employee's action against the railroad for damages for wrongful discharge under the provisions of the Railway Labor Act.

5. In not holding that a release of all claims and demands given as evidence of a settlement does not operate as a discharge of a claim which affirmatively appears not to have been included within the settlement as evidence of which the release was given, and that there could be no

legal consideration for a different and distinct claim for damages for wrongful discharge.

6. In holding that this is an action for wages, and not an action for damages for wrongful discharge under the Railway Labor Act.

7. In holding that under Article 3538 of the Louisiana Civil Code an action to recover damages for breach of a written contract of employment is barred unless brought within three years subsequent to the date the right of action arose.

8. In failing to hold that under Article 3544 of the Louisiana Civil Code the period of limitations on actions to recover damages for breach of a written contract of employment in the Federal Courts for Louisiana is ten years from the time causes of action to enforce the condition arises.

9. In considering respondent's invalid motion for summary judgment, and the state court records annexed thereto in determining whether summary judgment should be granted.

10. In not holding that respondent's motion for summary judgment, and the state court records showed on their face that they did not comply with the full mandatory provisions of subdivision (e) of Rule 56 of the Federal Rules of Civil Procedure.

11. In not holding that the Court did not have jurisdiction to hear the motion for summary judgment because it was not presented in compliance with the full mandatory provisions of subdivision (e) of Rule 56 of the Federal Rules of Civil Procedure.

12. In not holding that petitioner's complaint, and affidavit in opposition to respondent's motion for summary judgment presented genuine issues of material fact that

required the usual trial by witnesses, subject to cross-examination, that precluded summary judgment.

Reasons for the Allowance of the Writ

1. The Court below has decided important questions of local law in a way probably in conflict with applicable local decisions.

The decision is in direct conflict with the decisions of the Supreme Court of Louisiana in the following cases and particulars: In the case of *In re Dimmick's Estate, et al.*, 111 La. 655, 35 So. 801, in which it was held,

"A plaintiff is not compelled to include in his suit all the demands he may have against the defendant. It is expressly provided in the code that he may do so (Article 148), but it is nowhere provided that he must do so."

In the case of *Succession of Rosenbrock*, 145 So. 4, in which the Court held,

"The renunciation made in a compromise of all rights, claims, and pretensions extends only to what relates to the differences on which the transaction arises."

In the case of *Louisiana Truck & Orange Land Co., Limited*, v. *Page*, 5 So. 2d 365, in which it was held,

"A suit on a contract is a "personal action" which is subject to 10-year prescription."

In the case of *Roussel, et al.* v. *Railways Realty Co.*, 115 So. 742, in which it was held,

"Where thing demanded by plaintiffs is not same as their present demand and is not founded upon same cause of action, final judgment invoked by defendant has not authority of thing adjudged as against present action, under Rev. Civ. Code, Art. 2286, enumerating requisites to constitute judgment res judicata."

The decision is also in direct conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Union Producing Co.* v. *Driskell, et al.*, 117 F. 2d 229, in which it was held,

"Under Louisiana law, "res judicata" could not be based on plaintiff's splitting causes of action so as to bar present cause merely on grounds that it could have been adjudicated in their prior action, and judgments in prior actions for recovery of gas royalties and for damages for inadequate development of gas leases did not bar subsequent action based on claim that producing company failed to pay lessors the market price for gas produced and sold under the leases. Civ. Code, La. Art. 2286."

2. The Court below has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals on the same subject matter.

The decision is in conflict with the decision of the Circuit Court, N. D. California, in the case of *American China Development Co.* v. *Boyd*, 148 Fed. Rep. 258, which held,

"Where a contract of employment was broken by plaintiff's discharge during the month of June, 1904, a judgment recovered by plaintiff for his salary for that month did not estop him from thereafter suing defendant for damages for breach of contract."

The decision is in direct conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Burns* v. *Northern Pac. Ry. Co.*, 134 F. 2d 766, which is analogous to the case at bar, in which it was held:

"Railway's attempt to make stewart's discharge retroactive and subsequent refusal to admit stewart's just claim for $225.18 for wages and expenses constituted a refusal to pay an "existing legal obligation" and gave rise to no "dis-

pute" which could constitute "consideration" for settlement of claim for wrongful discharge by payment of $225.00.

A receipt in full of all claims and demands given as evidence of a settlement does not operate as a discharge of a claim which affirmatively appears not to have been included within the settlement as evidence of which the receipt was given."

The decision is in direct conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit, in the case of *Union Pac. Ry. Co.* v. *Artist*, 60 Fed. Rep. 365, which held,

"General words, alone, in a release, are taken most strongly against the releasor. But when there is a particular recital followed by general words the latter are qualified by the particular recital."

The decision is in direct conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *Union Pac. R. Co., et al.* v. *Olive*, 156 F. 2d 737, in which the Court held,

"A carman's action against railroad for damages for suspension, dismissal, and discharge in violation of railroad's agreement with carman's union was an action on a "contract obligation or liability founded upon an instrument in writing" within Nevada six-year limitation statute."

Summary Judgment

The decision is in direct conflict with the decision of the Court of Appeals, D. C., in the case of *Jameson* v. *Jameson*, 176 F. 2d 58, in which the Court held:

"Shall," within subsection (e) of this rule, providing that affidavits filed in support of or opposing summary judgment "shall" be made on personal knowledge, is mandatory

and requires that an affidavit state matters personally known to affiant."

The decision is in direct conflict with the decision of the Court of U. S. Appeals, D. C., in the case of *Wittlin* v. *Giacalone*, 154 F. 2d 20, 81 U. S. App. D. C. 20, in which it was held:

"Where motion for summary judgment was signed only by counsel and was not in affidavit form, the motion was not properly to be weighed, as far as its factual statements were concerned, in determining whether summary judgment should be granted."

The decision is in direct conflict with the decisions of the Circuit Court of Appeals for the Ninth Circuit, in the cases of *Bowers* v. *E. J. Rose Mfg. Co.*, 149 F. 2d 611, and *Aaron Ferer & Son* v. *Richfield Oil Corporation*, 150 F. 2d 12, in which it was held:

"Where affidavits of fact are so in opposition that there is a genuine issue as to the material facts, there is no warrant for summary judgment."

The decision is in direct conflict with the decision of the Court of Appeals, D. C., in the case of *Hunter* v. *Mitchell*, 180 F. 2d 763, in which it was held:

"On a motion for summary judgment the court's function is not to decide issues of fact but solely to determine whether there is an issue of fact to be tried and all doubts as to existence of a genuine issue as to a material fact must be resolved against the movant."

3. The Court below has decided a federal question in a way probably in conflict with applicable decisions of this Court.

"The decision is in direct conflict with the decision of this Court in the case of Texas and Pacific Ry. Co. v. Dashiell, 198 U. S. 521, in which it was held:

"General words in a release are to be limited and restricted to the particular words in the recital;" • • •

The decision is in conflict with the decision of this Court in the case of *Moore* v. *Illinois Central Railroad Co.*, 61 S. Ct. 754, 312 U. S. 630, 85 L. Ed. 1089, in which it upheld the decision of the Supreme Court of Mississippi in the case of *Moore* v. *Illinois Central R. Co.*, 176 So. 593, in its interpretation holding that:

"A trainman's action against railroad for damages for wrongful discharge contrary to contract between railroad and trainman's union was based on written contract with union rather than on verbal contract of employment, and hence was subject to 6-year rather than 3-year statute of limitations under Mississippi law."

Summary Judgment

The decision is in direct conflict with the decision of this Court in the case of *Automatic Radio Mfg. Co.* v. *Hazeltine Research*, 339 U. S. 827, 70 S. Ct. 894, 94 L. Ed. 1312, in which it was held:

"Where attorney's affidavit in support of motion for summary judgment was made upon information and belief and relevant portions thereof did not comply with subdivision (e) of this rule, United States Supreme Court would disregard averment in the motion as not supported by record."

The decision is in direct conflict with the decision of this Court in the case of *Sartor, et al.* v. *Arkansas Natural*

Gas Corp., 321 U. S. 620, 627, 64 S. Ct. 724, 728, 88 L. Ed. 967, in which the Court said on page 627:

"The Court of Appeals below heretofore has correctly noted that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose is not to cut litigants off from their right of trial by jury if they really have issues to try." • • •

Wherefore, your petitioner respectfully prays that a writ of certiorari issue to review the order of final judgment of the United States Court of Appeals for the Fifth Circuit entered by that Court in this case on June 30, 1952, rehearing denied August 4, 1952, and that the said order of final judgment may be reversed by this Honorable Court, and the case remanded to the United States District Court for the Western District of Louisiana for a new trial, and that your petitioner may have such other and further relief as this Honorable Court may deem proper.

Robert L. Richmond,
Petitioner, pro se.

APPENDIX

Pertinent provisions of the Railway Labor Act, 45 U. S. C. Section 151 et seq., reads as follows:

"Section 151a. General purposes

The purposes of this chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. (May 20, 1926, c. 347, Section 2, 44 Stat. 577, as amended June 21, 1934, C. 691, Section 2, 48 Stat. 1186.)

Section 152. General duties

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

* * * * * * *

Pertinent provisions of Rule 56. Summary Judgment of the Federal Rules of Civil Procedure, 28 U. S. C., read as follows:

"Subsection (e) Form of Affidavits; Further Testimony.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be

admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits."

Article 3073 of the Revised Civil Code of Louisiana reads as follows:

"Matters Covered by Compromise. Transactions regulate only the differences which appear clearly to be comprehended in them by the intention of the parties, whether it be explained in a general or particular manner, unless it be the necessary consequence of what is expressed; and they do not extend to differences which the parties never intended to include in them.

The renunciation, which is made therein to all rights, claims and pretensions, extends only to what relates to the differences on which the transaction arises."

Act Number 150 of the Louisiana Legislature of 1920, as amended by Act Number 138 of 1936, reads as follows:

"Discharged Laborers—Payment within twenty-four hours.—It shall be the duty of every person, individual, firm or corporation employing laborers or other persons of any kind whatsoever when they have discharged any laborer or other employee, or when any such laborer or employee has resigned, to pay the laborer or employee the amount due under the terms of employment whether said employment is made by the day, week or month, upon demand being made by the said discharged or resigned laborer or employee, upon his employer, at the place where said employee or laborer is usually paid. (Acts 1920, No. 150, Sec. 1; 1936, No. 138, Sec. 1.) Dart's Statutes, Sec. 4360.

Penalty for violating Act.—Any individual, firm, person or corporation employing laborers, or others in this state shall fail or refuse to comply with the provisions of Section 1 (Sec. 4360) of this Act, shall be liable to the said

laborer or other employee for his full wages from the time of such demand for payment by the discharged or resigned laborer or employee, until the said person, firm, or corporation shall pay or tender payment of the amount due to such laborer or other employee, provided further, that reasonable attorney's fees shall be allowed such laborer or employee by the court in addition thereto and taxed as costs to be paid by such employer, in event a just suit is filed by such laborer or employee after twenty-four hours shall have elapsed from time of making such first demand following discharge or resignation. (Acts 1920, No. 150, Sec. 2; 1936, No. 138, Sec. 1.) Dart's Statutes, Sec. 4361."

No. 435

ROBERT L. SICKMOND,

vs.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 435

ROBERT L. RICHMOND,

vs. *Petitioner,*

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Respondent

PETITION FOR REHEARING

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Robert L. Richmond, respectfully prays for a rehearing of the order of this Court dated January 5, 1953, denying his petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Basic Facts

This is an action under the Railway Labor Act, 45 U. S. C., Section 151 *et seq.*, for damages against the respondent railroad company for wrongful discharge in violation of the terms of a written contract of employment between the clerks and the railroad, as more fully shown in the petition for writ of certiorari, pages 2-11.

The United States Court of Appeals for the Fifth Circuit affirmed judgment of the District Court sustaining motion for summary judgment in favor of respondent (R. 75-79) holding that a compromise agreement executed in December, 1942 between petitioner and respondent in settlement of a suit then pending in a Louisiana State Court instituted by petitioner against respondent for his separate and independent claim for wages earned and unpaid at the time of his discharge under a Louisiana penal statute enacted to compel an employer to pay an employee within 24 hours after discharge operated as a discharge of petitioner's claim for damages for wrongful discharge in this action.

The written opinion of the Judge of the District Court (R. 46-58), and particularly the last paragraph on page 54, discloses that that Court erroneously took the view that petitioner had only a single cause of action against the respondent arising from his employment after his discharge and the termination of the contract, disregarding the decisions in *Elliott* v. *Miller,* 17 N. Y. S. 526, and *Viall* v. *Lionel Mfg. Co.,* 98 Atl. 329, reviewing and distinguishing the two causes of action, and holding that "the action for salary earned is not a bar to the action for damages for breach of contract", and the decision of *American China Development Co.* v. *Boyd,* 148 Fed. Rep. 258, which held that "Where a contract of employment was broken by plaintiff's discharge during the month of June, 1904, a judgment recovered by plaintiff for his salary for that month did not estop him from there after suing defendant for damages for breach of contract".

Petitioner urged in the Courts below, and alleged in his petition for writ of certiorari (P. 18-19), that the decision of the Court below was in direct conflict with the decision with the analogous case of *Burns* v. *Northern Pac. Ry.,* C. C. A. 8, 134 F. 2d 766, which held that "A receipt in full

of all claims and demands given as evidence of a settlement does not operate as a discharge of a claim which affirmatively appears not to have been included within the settlement as evidence of which the receipt was given".

Petitioner also alleged in his petition that the decision of the Court below was in direct conflict with the decision in the case of *Union Pac. Ry. Co.* v. *Artist,* C. C. A. 8, 60 Fed. Rep. 365 (P. 19), and the decision of this Court in the case of *Texas and Pac. Ry. Co.* v. *Dashiell,* 198 U. S. 521, which followed the decision in *Jackson* v. *Stackhouse,* 1 Cowden 122, 13 Am. Dec. 514, holding that "General words in a release are to be limited and restricted to the particular words in the recital". See Ann. Cas. 1912A, 498, reporting *Van Slyke* v. *Van Slyke,* 78 Atl. 179, for a review of authorities supporting the general rule, which clearly shows that the decision of the Court below has created a conflict in the decisions that have been observed since the beginning of American jurisprudence regarding the interpretation and effect of words of release following a particular recital.

In this petition for rehearing petitioner presents the question as to whether the Court below had jurisdiction and the power to hear and determine the motion for summary judgment, and to render the judgment sustaining the motion on the face of the record, and as presented under Question No. 4 in the petition (P. 13).

Question Presented No. 4 (P. 13) (Restated) is:

"Whether a Court may grant summary judgment for a defendant before answer is filed under Rule 56 of the Federal Rules of Civil Procedure, 28 U. S. C. A., when the motion signed by the attorney for the defendant-movant was not in affidavit form, was not made on the attorney's personal knowledge, nor shown that the attorney possessed the knowledge asserted, and the purported supporting documents annexed to the motion were not in affidavit form as

required by the mandatory provisions of subdivision (e) of the Rule or is, as petitioner contends the motion a complete nullity".

Subdivision (e) of Rule 56 provides:

"(e) Form of Affidavit; Further Testimony.—Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto, or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits."

The Judge of the District Court in ruling on the sufficiency of respondent's purported motion for summary judgment in his opinion said (R. 50—first paragraph): "*The motion to dismiss and for summary judgment is not supported by affidavit, but bears merely the certificate of counsel that copy had been mailed to plaintiff, who is his own lawyer of record.* However, the exhibits attached thereto are properly certified by the state judge and clerk and therefore may be considered for what they appear to be." (Emphasis by the writer.)

The record shows on its face that the certificate of the Clerk of the State Court (R. 20) only includes "the petition and motion to dismiss in suit No. 84,515, entitled *Robert L. Richmond* v. *St. Louis Southwestern Railway Company*, as same appears on the docket of the First Judicial District Court in and for Caddo Parish, Louisiana." The certificate is not verified under oath, and it makes no mention of the purported compromise agreement on which the Courts below based their decisions in granting summary judgment to respondent, and as shown by the record (R. 72-73) the

purported compromise agreement was not certified as a true copy, nor supported by affidavit, and in effect it was merely a copy of an unverified document added to respondent's purported motion for summary judgment by respondent's attorney. Accordingly, the Court was without jurisdiction and authority to consider the purported compromise agreement, or the State Court records in the determination of the motion for summary judgment.

An examination of respondent's purported motion for summary judgment (R. 9-21) discloses a total disregard of the requirements of Rule 56(e) in that the motion clearly and unmistakably shows on its face that it was not in affidavit form and that it was not intended by respondent to file the motion in affidavit form, and the purported motion contains no statement by the attorney who signed the paper that he possessed any personal knowledge of the averments in the purported motion.

The requirement that an oath be administered is inherent in the very definition of an affidavit, so that not only is the administration of an oath essential to the validity of the instrument but also it is essential to constitute the paper an affidavit. The requirements of an affidavit were stated in the case of *In Re Central Stamping & Mfg. Co.*, 77 F. Supp. 331, to be: "An affidavit is a statement or declaration reduced to writing and sworn to or affirmed before some officer who has authority to administer oath or affirmation; a statement of fact which is sworn to as the truth." To the same effect see *In re Beecher*, 50 F. Supp. 530. Other pertinent decisions are: No statement which is not properly sworn to constitutes an "affidavit". *Federal Chemical Co.* v. *Farmers Produce Exchange*, 118 S. W. 2d 1067. Purported affidavit is mere statement, unless properly sworn to. *E. L. Witt & Sons et al.* v. *Stith*, 265 S. W. 1076. A purported affidavit is nugatory unless oath is administered by

authorized official. *Zimmerman* v. *Industrial Commission, et al.*, 120 P. 2d 636.

The respondent's purported motion for summary judgment (R. 9-21) shows conclusively on its face that it does not meet the requirements of an affidavit, nor was it supported by affidavits, and, accordingly, the purported motion was nugatory, and formed no part of the record proper.

The Court of Appeals did not discuss the sufficiency or validity of respondent's motion for summary judgment in its opinion affirming the judgment of the District Court (R. 76-79).

Rule 56 of the Federal Rules of Civil Procedure is not merely directory but affects the substantial rights of the litigants and since it provides a somewhat drastic remedy it must be used with a due regard for its purposes, and a cautious observance of its requirements in order that no person will be deprived of a trial of disputed factual issues. The rule requires that there must be a strict compliance with the prerequisites to establish the Court's power to render summary judgment, otherwise the rule may be easily nullified, and since respondent's purported motion for summary judgment was not in affidavit form, nor supported by an affidavit made on personal knowledge by an affiant, as required by the mandatory provisions of Rule 56, the failure to comply with the requirements of the Rule was fatal to the respondent's motion, as the Court was without power or jurisdiction to entertain the motion, or to render the judgment for the reason that the proper affidavit was not made. To hold otherwise would set a precedent that would breed confusion and uncertainty and encourage laxity in complying with the vital steps in filing a motion for summary judgment.

In *Thatcher* v. *Powell*, 19 U. S. 119, 6 Wheat 119, 5 L. Ed. 221, this Court spoke on an analogous subject as follows:

"In Summary proceedings, where a court exercises an extraordinary power, under a special statute, which prescribes its course, that course ought to be strictly pursued, and the facts which give jurisdiction, ought to appear on the face of the record; otherwise, the proceedings are not merely voidable, but absolutely void, as being coram non judice."

The Court of Appeals for the Eighth Circuit in the case of *Parmelee* v. *Chicago Eye Shield Co.*, 157 F. 2d 582, stated: "The summary judgment procedure is a drastic remedy and federal rules relating to summary judgment must be strictly complied with." Other pertinent decisions are: "The Federal Rules of Civil Procedure have the same force and effect as statutory enactments of Congress. Federal rules regarding admission of facts and genuineness of documents, and providing for summary judgment, are not merely directory but affect substantial rights of litigants. Mandatory rules for trial courts promulgated under express direction of Legislature cannot be waived by a party even with consent of court, but under certain circumstances party may consent to suspension of rule and waive benefit thereof. *United States* v. *Brandt, et al.*, 8 F. R. D. 163. Courts are without authority to nullify requirements of federal rule providing manner in which jurisdiction can be acquired. *Blanc* v. *Young*, 10 F. R. D. 109.

In the case of *Dowling* v. *Isthmian S. S. Corp.*, C. A. Pa., 184 F. 2d 758, certiorari denied 71 S. Ct. 493, 340 U. S. 935, 95 L. Ed. 675, it was held: "Court rules, including rules of practice prescribed by Supreme Court for inferior tribunals, as well as rules made by lower courts for their own guidance under statutory authority, cannot enlarge or restrict courts' jurisdiction nor abrogate or modify substantive law."

It was held in the case of *Joy et al.* v. *Hague et al.*, C. C. A. 1, 175 F. 2d 395, that "It is duty of court, if it finds that

jurisdiction does not exist, to proceed no further, but to dismiss the suit."

This Court in the case of *In The Matter of the National Labor Relations Board,* 304 U. S. 486, at page 494 said: "Jurisdiction as the term is to be applied in this instance, is the power to hear and determine the controversy presented, in a given set of circumstances. A court has jurisdiction, in another use of the term, to examine the question whether that power is conferred upon it in the circumstances disclosed, but if it finds such power is not granted it lacks jurisdiction of the subject matter and must refrain from any adjudication of rights in connection therewith." • • • See also, *Hartford Life Ins. Co.* v. *Johnson,* C. C. A. 8, 268 Fed. Rep. 30, at page 34, which said "It is the power to hear and determine the subject matter in controversy which constitutes jurisdiction." (See also authorities cited.)

In the case of *Saul* v. *Saul,* App. D. C., 122 F. 2d 64, 74 App. D. C. 287, the Court held: "Total lack of power in a court to deal with the subject matter presented to it in a particular suit goes not merely to protection of the parties in securing a fair hearing, but to the authority of the court itself."

It was held in the case of *Quereau* v. *Lehigh Valley R. Co.,* 251 Fed. Rep. 251, that "An act done or an order made by the presiding judge or court in the course of a trial is void, if the court or judge had no jurisdiction to do that particular thing or make that particular order, even though it had jurisdiction of the parties and the case."

Petitioner alleged in his petition (P. 19) that the decision of the Court below was in direct conflict with the decision of the Court of Appeals, D. C., in the case of *Jameson* v. *Jameson,* 176 F. 2d 58, in which the Court held: "Shall", within subsection (e) of this rule, providing that affidavits filed in support of or opposing summary judgment "shall"

be made on personal knowledge, is mandatory and requires that an affidavit state matters personally known to affiant."

The same holding was observed in the cases of *Person* v. *United States*, C. C. A. 8, 112 F. 2d 1, certiorari denied 61 S. Ct. 35, 311 U. S. 672, 85 L. Ed. 432; *Walling* v. *Fairmount Creamery Co.*, C. C. A. 8, 139 F. 2d 318; and, *Sprague* v. *Vogt et al.*, C. C. A. 8, 150 F. 2d 795.

Since respondent ignored entirely the mandatory requirements of Rule 56(e) by not filing an affidavit in this case the decision of the Court below in sustaining respondent's invalid motion for summary judgment is clearly in conflict with the above quoted decisions of the other Circuit Courts of Appeals.

Petitioner alleged in his petition (P. 20) that the decision of the Court below was in direct conflict with the decision of the Court of U. S. Appeals, D. C. in the case of *Wittlin* v. *Giacalone*, 154 F. 2d 20, 81 U. S. App. D. C. 20, in which it was held: "Where motion for summary judgment was not in affidavit form, the motion was not properly to be weighed, as far as its factual statements were concerned, in determining whether summary judgment should be granted." This case also held that "The courts are critical of papers presented by party moving for summary judgment but not of the opposing papers."

The above quoted decision is in point with the instant case, and since the Court of Appeals for the Fifth Circuit reached an opposite result on the same question by sustaining respondent's unverified motion for summary judgment there is clearly an unmistakable conflict between the two Courts of Appeals.

Petitioner also alleged in his petition (P. 21) that the decision of the Court below was in direct conflict with the decision of this Court in the case of *Automatic Radio Mfg.*

Co. v. *Hazeltine Research*, 339 U. S. 827, 70 S. Ct. 894, 94 L. Ed. 1312, in which it was held:

"Where attorney's affidavit in support of motion for summary judgment was made upon information and belief and relevant portion thereof did not comply with subdivision (e) of this rule, United States Supreme Court would disregard averment in the motion as not supported by record."

Petitioner's case is much more favorable than the above quoted case for the reason that respondent's attorney filed no affidavit at all in the instant case, and disregarded the requirements of subdivision (e) entirely, and since the Court of Appeals for the Fifth Circuit reached an opposite result on the same question in sustaining respondent's invalid motion for summary judgment there is clearly a conflict with the decision of this Court.

The record and proceedings in this case unmistakably show that the trial Court was without power or jurisdiction to entertain the purported motion for summary judgment, or to render the judgment thereon, because of the failure of the respondent to comply with the mandatory provisions of Rule 56 in presenting the motion, and the public importance for granting a writ of certiorari is reflected in the numerous conflicts that the decision of the Court of Appeals for the Fifth Circuit has created with decisions of other Circuit Courts of Appeals, and with the decisions of this Court, on the same questions.

Conclusion

For the foregoing reasons, petitioner respectfully prays that the order of this Court denying his petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit be reheard and vacated and that the petition be granted.

Robert L. Richmond,
Petitioner, pro se.

Certificate of Petitioner

STATE OF TEXAS,
County of Tarrant, ss:

Robert L. Richmond, being first duly sworn, deposes and says, that he is the petitioner in the above and foregoing petition, and that he hereby certifies that the foregoing petition for rehearing filed in this cause is presented in good faith, and that in his judgment said petition is restricted to the grounds specified in paragraph 2 of Rule 33 as amended, and that said petition for rehearing is not interposed for delay.

ROBERT L. RICHMOND.

Sworn to and subscribed before me this 13th day of January, 1953.

QUINNIE FAE PACE,
[SEAL.] *Notary Public, Tarrant County, Texas.*

My Commission Expires 6-1, 1953.